Supreme Court, U.S.
FILED
APR 3 1991
OFFICE OF THE CLERK

(2)

No. 90-1234

In the Supreme Court of the United States

OCTOBER TERM, 1990

ANTONIO DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether petitioner was punished under a statute that was not in effect at the time he committed the offense for which he was sentenced.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Berkemer v. *McCarty*, 468 U.S. 420 (1984) 3
Gozlon-Peretz v. *United States*, 111 S. Ct. 840 (1991) 4
United States v. *Lovasco*, 431 U.S. 783 (1977) .. 3

Constitution and statutes:

U.S. Const.:
Art. I, § 9, Cl. 3 (Ex Post Facto Clause) ... 3
Amend. V 5
Amend. VIII 5

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181:
Tit. VI, 102 Stat. 4181:
§ 1012, 102 Stat. 4189 4
Tit. II, 102 Stat. 4191:
§ 2404(d), 102 Stat. 4231 4
§ 2600, 102 Stat. 4233 4
Tit V, 102 Stat. 4295:
§ 5160, 102 Stat. 4308 4
§ 5301(h), 102 Stat. 102 Stat. 4312 4
Tit. VI, 102 Stat. 4312:
§ 6061, 102 Stat. 4320 4
§ 6105(e), 102 Stat. 4341 4
§ 6470(g), 102 Stat. 4378 4
§ 6470(g)(3), 102 Stat. 4378 3

Cases—Continued: Page

Tit. VII, 102 Stat. 4387:
§ 7079(b), 102 Stat. 4406 4
§ 7296(a), 102 Stat. 4463 4
§ 7303(d), 102 Stat. 4464 4
§ 7366(b), 102 Stat. 4478 4
§ 7513(c), 102 Stat. 4488 4
21 U.S.C. 841 5
21 U.S.C. 841(a)(1) 2
21 U.S.C. 841(b)(1)(A)(viii) 3
21 U.S.C. 841(b)(1)(C) (Supp. V 1987) 4
28 U.S.C. 2255 3

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1234

ANTONIO DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is not reported, but the judgment is noted at 917 F.2d 562 (Table).

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1990. The petition for a writ of certiorari was filed on January 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted

on one count of manufacturing more than one kilogram of methamphetamine and one count of possessing more than one kilogram of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1a-10a.

Before the events giving rise to the charges in this case occurred, petitioner had been arrested and charged in California with conspiracy to manufacture methamphetamine in violation of California law. Petitioner agreed to work for California authorities as a confidential informant, making controlled purchases of methamphetamine from six individuals known to be local manufacturers. Without informing his law enforcement contact in California, however, petitioner traveled to Texas to purchase ephedrine, a precursor chemical used in the manufacture of methamphetamine. Ephedrine is a controlled substance in California but not in Texas. Petitioner claimed at trial that the ephedrine was purchased for one of the six California targets from whom he planned to purchase methamphetamine. Pet. App. 2a-3a.

In Houston, petitioner arranged for the purchase of 25 kilograms of ephedrine from Ron Fernandez, the owner of a chemical equipment company. As part of the transaction, petitioner promised Fernandez that he would teach two other people how to manufacture methamphetamine using the ephedrine process. The two people turned out to be undercover agents of the Drug Enforcement Administration. Pet. App. 3a.

Petitioner disassembled a laboratory he operated in Crosby, Texas, and reassembled it in a hotel room in Houston. Petitioner gave the undercover agents instructions for the chemical synthesis of methamphetamine, and he manufactured a batch of methamphetamine in their

presence in order to demonstrate certain complex steps in the process. Once the process was complete, the agents arrested petitioner and seized more than 3,000 grams of methamphetamine. Pet. App. 3a.

Petitioner claimed at trial that he was acting in furtherance of his agreement with the California authorities, and he asserted a defense of reasonable reliance on public authority. The district court instructed the jury on the defense of public authority, but the jury rejected that defense and convicted petitioner on both counts charged. Pet. App. 3a-4a.

ARGUMENT

Petitioner contends (Pet. 3-6) that his sentence was imposed in violation of the Ex Post Facto Clause of the Constitution because he was punished under a penalty provision that was not yet in effect at the time he committed the charged offenses.

First, we note that petitioner failed to raise this claim in either the district court or the court of appeals. This Court customarily does not consider issues that were not raised in the courts below. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977).[1]

Second, petitioner is incorrect in his claim that the penalty provision under which he was sentenced had not taken effect at the time he committed his offenses. Petitioner was sentenced under 21 U.S.C. 841(b)(1)(A)(viii) (see Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6470(g)(3), 102 Stat. 4378, and Pet. App. 22a-25a), which provides for

[1] If petitioner had been sentenced under a provision not yet in effect at the time of his crimes, the proper course would be to file a motion under 28 U.S.C. 2255 in the district court claiming that his sentence was illegal.

a mandatory minimum of ten years' imprisonment for an offense involving more than 100 grams of methamphetamine. He argues that this provision, which superseded the previous penalty of a maximum of 20 years' imprisonment (21 U.S.C. 841(b)(1)(C) (Supp. V 1987)), did not take effect until March 28, 1989, nearly two months after the date of his offense, February 4, 1989. Petitioner cites a provision from the amending legislation, the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6061, 102 Stat., 4320, which provides as follows:

> Except as otherwise provided in this subtitle, this subtitle shall take effect 120 days after the enactment of this Act.

As the plain language of this provision indicates, it applies to the subtitle in which it is found, that is, Subtitle A of Title VI of the Act. The part of the statute that amends the penalty for the possession and manufacture of methamphetamine is found in Subtitle N of Title VI at Section 6470(g). There is no reference to a special effective date for that subtitle or for Title VI as a whole. Nor is there an effective date specified for the Anti-Drug Abuse Act as a whole, although the Act provides effective dates for some discrete sections. See, *e.g.*, Pub. L. No. 100-690, §§ 1012, 2404(d), 2600, 5160, 5301(h), 6105(c), 7079(b), 7296(a), 7303(d), 7366(b), 7513(c).

As this Court has recently stated, in the absence of a clear directive from Congress to the contrary a law takes effect on the date of its enactment. *Gozlon-Peretz* v. *United States*, 111 S. Ct. 840, 846 (1991). Since the Act contains no effective date for Section 6470(g), that section must be deemed to have taken effect upon enactment—that is, on November 18, 1988, almost three months before petitioner committed his offenses. 111 S. Ct. at 846-847. The district court

therefore properly sentenced petitioner under the amended penalty provisions of Section 841.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
KATHLEEN A. FELTON
Attorney

APRIL 1991

[2] Petitioner's claim that his sentence also violated his Fifth and Eighth Amendment rights to due process and freedom from cruel and unusual punishment likewise fails, as it is based on his assertion that the penalty provision that the sentencing court relied on was not yet in effect.

U.S. GOVERNMENT PRINTING OFFICE: 1991 282-061/20463